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IN THE

Supreme Court of the United States

October Term, 1938.

No. 329.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,
Appellants,

v.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, et al.

APPELLANTS' REPLY BRIEF.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellants.

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APPELLANTS' REPLY BRIEF.

This brief will be directed to two points: (a) whether if this Court reverses the Court below, it should direct the latter to grant a preliminary injunction or merely confine itself to a reversal on the jurisdictional question; and (b) an answer to certain of the contentions in respondents' brief that the bill and affidavits do not establish that the controversy involves more than $3,000.

I. THE COURT SHOULD DIRECT THAT THE INTERLOCUTORY INJUNCTION BE GRANTED.

Appellees' brief contends that this Court should limit itself to the consideration of the jurisdictional question alone. We submit that under the peculiar circumstances of this case, to be presently detailed, the Court should go further and direct that the preliminary injunction issue if it determines that appellants' position on the question of jurisdiction is sound. The question as to whether the preliminary injunction should issue depends, aside from the jurisdictional question, upon whether the State statute is constitutional. This latter question can de determined from the face of the State Statute itself without regard to evidence. The jurisdictional question must, of course, be determined on this appeal.

If a State Statute on its face violates the Federal Constitution, it can hardly be asserted that the question of whether a preliminary injunction against the enforcement thereof should issue is a matter within the judicial discretion of the court to which the application for the injunction is addressed. Certainly a failure to grant an injunction against the enforcement of an unconstitutional statute would be an abuse of discretion. The cases cited in appellees' brief (P. 3) are not applicable to the situation here presented.

In *Bordens Co.* v. *Baldwin*, 293 U. S. 194, 213, the Court specifically said:

> "* * * we do not pass upon the ultimate question of the constitutionality of the statute."

In *Wilshire Oil Co.* v. *United States*, 295 U. S. 100, the case was before the Court on a certificate from a Circuit Court of Appeals. The Court said (P. 103):

> "Nor should this Court undertake to determine the constitutional validity of the statute upon such questions as those which have been certified. If this Court were to deal with the case in its present stage, *it would*

be necessary to order up the entire record, so that the allegations of the bill, and the case as presented to the District Court, could be properly considered. That course would merely bring before this Court the interlocutory order and would *result in unnecessary delay in the final determination of the case.*" (Italics ours)

In *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347, the Court refrained from passing upon the constitutionality of the statute there involved. We can see no possible pertinency of that case.

In *Alabama* v. *United States*, 279 U. S. 229, the Court was reviewing an order of the Interstate Commerce Commission, establishing interstate rates, and applied the well settled doctrine that the decision of a lower court and board, in granting or denying a preliminary injunction will not be reviewed except for abuse or discretion.

In the case at bar the injunction was not denied in the exercise of discretion but because the Court below considered the allegations of the bill and the supporting affidavits insufficient to establish that the jurisdictional amount was in controversy. We take it, therefore, that there is no reason why this Court should not order the preliminary injunction to be granted if it considers that the Court below had jurisdiction, provided, of course, sufficient compelling circumstances are shown.

Appellants have been compelled since the effective date of the State Statute (June 14, 1937) to forego the collection of all royalties due under their contracts with licensees in the State of Washington although their works are being constantly performed in the State (Offer of Proof, R. 295).

The long delay in disposing of this case was not due to any fault of appellants. They brought this suit to restrain enforcement of the State Statute before the Statute's effective date (suit having been filed and application for injunction having been made on May 28, 1937 (R. 335)). The case was not set down for hearing until June 29, 1937, and decision was not rendered until May 9, 1938.

Because of the court's ruling that there was no competent evidence showing that the matter in controversy exceeded $3,000 (R. 248, 276) and because of provision in the court's opinion for making motions for "additional orders * * * based upon the foregoing ruling" (R. 276), appellants applied for leave to submit additional oral testimony in support of their allegations. An affidavit in support of an application to take additional testimony (R. 277-83) was filed May 17, 1938 (R. 337), and an order to show cause directing a hearing on that application to be held on June 28, 1938, was made on June 2, 1938 (R. 284).

At the hearing held on June 28, 1938, appellants offered to present oral testimony by deposition or by witnesses, who were produced in open court after making the journey to Tacoma, Washington, from New York City and elsewhere. The Court below, however, refused to permit such testimony to be taken (R. 286-303).

Appellants perfected their appeal herein on August 1, 1938 (R. 327) and have pursued their appeal with the greatest diligence. The fact remains, however, that appellants have not been able to enjoy the benefits of their copyrights in the State of Washington for a period of over eighteen months.

Appellants were confronted with a similar situation in the State of Montana, where a statute similar to the State Statute (Laws of Montana, 1937, Ch. 91) was enacted on March 12, 1937. A suit to restrain enforcement of that statute was brought in the United States District Court for the District of Montana, Helena Division, and a motion for interlocutory injunction was heard on April 23, 1937. (*Carl Fischer, Inc.* v. *Shannon*, D. C, Mont No. 1537) Decision in that case was withheld for over twenty months, after which an opinion dismissing the bill of complaint for want of a "showing that the requisite jurisdictional amount is involved" was delivered on December 28, 1938, by the same presiding Judge who presided in the court below in the case at bar, with a dissenting opinion by District Judge Baldwin.

If this Court should be of the opinion that the record shows the jurisdiction of the court below, and should fail to direct the granting of an interlocutory injunction, appellants will be remitted to the court below for action on their application for such injunction. In most probability they will again suffer endless delay before their motion is finally disposed of. Thus, appellants may be denied their constitutional rights in the States of Washington and Montana for such a long period of time as to defeat the ends of justice.

It is submitted that the court below should be directed to grant the interlocutory injunction forthwith, to the end that appellants may not suffer further undue and irreparable injury through a Statute, which, it is submitted, is unconstitutional on its face. *Cf. McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 420; *Davis* v. *Denver Union Water Co.*, 246 U. S. 178, 182.

II. THE BILL AND RECORD AMPLY ESTABLISH JURISDICTION.

Appellees argue that "only the allegations of the complaint, and not accompanying affidavits or testimony, can be considered" (Appellees' br. p. 9), and thereupon proceed to an examination of the bill of complaint ignoring all the supporting facts established by affidavit.

We submit that the bill of complaint *alone* contains a sufficient showing of jurisdiction; secondly, that if there be any doubt about the subject, the *affidavits* conclusively support the allegations of the bill in great detail, and finally, that if any lingering doubt remains after an examination of the bill and affidavits, appellants should have been permitted to offer oral testimony in support of their allegations.

Appellees' present position is inconsistent with the opinion of the court below. The finding that the allegations of the bill are insufficient to show that the value of the matter in controversy exceeds $3,000 (R. 305) must be read in the

light of the statement in the court's opinion, to the effect that

> "if the allegations of the Bill as to jurisdictional facts are by the defendants challenged in an appropriate manner, complainants must support them 'by competent proof', McNutt v. General Motors Acceptance Corp., 298 U. S. 178-189.
>
> "There is no question but that the motion of the defendants to dismiss, denying that the matter in controversy exceeds $3,000.00 exclusive of interest and costs, was sufficient at the hearing had to place upon complainants the burden of so establishing that it is in excess of such amount." (R. 272)

The conclusion of the court that jurisdiction was not shown was not based upon the allegations of the complaint alone but rather upon a theory that when a motion is made to dismiss the complaint for want of jurisdiction, the burden rests upon the plaintiff to establish all the facts relating to jurisdiction, in the same manner as if the case were being tried on the merits. This explains the finding of the court "That the *record* does not show that the value of the matter in controversy, exclusive of interest and costs, exceeds $3,000.00" (R. 305), and the further finding "That the *record* does not show what is the value of the matter in controversy" (R. 306).

We submit that for the purpose of an application for interlocutory injunction and for the purpose of the motion to dismiss the complaint, the jurisdictional facts were amply alleged, and that had the court permitted appellants to offer oral testimony in support of their jurisdictional allegations, the record would contain the same quantum of proof that would be necessary upon a trial after issue joined by answer.

In the case at bar it must be remembered that no answer has been interposed, and that the decision below deprives appellants of any opportunity to prove their case upon the merits in the usual manner. See *Polk Co.* v. *Glover*, 83 L. Ed. 73, 75.

Appellees' brief (page 4) erroneously states that on the June 28, 1938, hearing "complainants' counsel, *without having previously given notice of intention to do so,* asked the court immediately to hear the testimony of three witnesses brought to the hearing."

The fact of the matter is that appellants asked the court to permit these witnesses to testify in any manner that the court saw fit, by deposition in New York or before a Master in Washington or in open court at the very hearing on the return of the motion for leave to submit such testimony (R. 277-284). Since the court, in its opinion, complained that counsel for appellees had been given no opportunity of cross-examination, there was no better way to manifest appellants' good faith than to bring their witnesses to court on the return day of the order to show cause. Had they not done so, they would have been subjected to criticism for failure to offer "competent evidence." Having offered such evidence to show their good faith, after an order to show cause, they are now criticized for not having delayed presentation of oral testimony until *after* the court's ruling on their application.

Insofar as the court dismissed because the *record* does not show the value of the record in controversy, the findings are inconsistent with the opinion of the court and its action on the motion to submit oral testimony. If the court believed that the form of the averments in the record as to jurisdiction was not "*competent,*" and that the facts alleged should have been established by *oral* testimony with an opportunity for cross-examination, the court should have permitted such testimony to be taken. The truth is that oral testimony was wholly unnecessary and that the record in its present form amply sustains the jurisdictional allegations. The court erred in its opinion when it suggested that oral testimony was necessary and it doubly erred when it refused to hear such testimony once it was offered.

Appellees erroneously contend (pp. 13-14) that

> "[1] So far as appears from the complaint, the entire $60,530.68 collected in the State of Washington may have been paid to the 44,000 members of the foreign societies and nothing to the Society's own members. [2] So far as appears from the complaint none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington. [3] The same impossibility of segregation exists with reference to the allegation of the cost of compiling the information required by the Washington statute, only a single amount being pleaded both for the Society and the 44,000 foreign composers."

These three statements are all incorrect. In the first place, there is nothing in the record to show that any part of the $60,530.68 collected in the State of Washington was paid to the 44,000 members of the foreign societies. The complaint alleges (R. 19-20):

> "Under mutual working arrangements with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the latter are not required to, and never have, filed lists of the respective works copyrighted by their respective members."

It is obvious from this allegation that insofar as this record is concerned, the consideration for the granting of rights in the United States by the foreign societies is a reciprocal grant by members of the American Society under their foreign copyrights to the respective foreign societies. The term "mutual working arrangements" is expressly so explained in paragraph 25 of the complaint. The hypo-

thetical situation which appellees' brief creates cannot by any reasonable stretch of the imagination be inferred from the pleadings.

It is clear that the appellant Society which is before this court will lose all of the $60,530.68 collected annually from copyrights in the State of Washington because the members of the Society cannot rescind their grants to foreign societies merely because of the passage of the State Statute.

The second statement quoted above is likewise erroneous. The statement "that none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington" is refuted by the following allegations of the complaint:

> "The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Washington, and a great number of the copyrighted works of the complainants are being constantly performed in the State [fol. 32] of Washington, and will continue to be performed in the State of Washington" (R. 23).
>
> "* * * that the programs broadcast by many stations outside of the State of Washington, whether affiliated or not with any station located within the State of Washington are heard within the State of Washington, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Washington broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Washington" (R. 23-4).
>
> "There are thirty-one counties in the State of Washington, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal arrangements" (R. 27-8).

These allegations are supported by the testimony of the operator of two large broadcasting stations in the State of Washington, Bert F. Fisher, whose testimony is as follows: R. 243-4:

> "I am connected with radio stations KOMO and KJR as Secretary of the corporation and General Manager of the stations, which I have been managing since 1925. These stations are on the air approximately seventeen hours each day. *75 per cent of that time is devoted to the broadcasting of copyrighted music and musical compositions,* of various kinds. *In the course of each hour fifteen or more musical compositions or parts of them are broadcast,* on an average.
>
> "*I have no license from any copyright owners other than the American Society of Composers, Authors, and Publishers to broadcast their musical compositions and have never had one to my knowledge.* I do not know what musical compositions are controlled by the American Society of Composers, Authors, and Publishers, or how many there are. *We make no attempt to confine the broadcasting of your musical compositions owned or controlled by that Society. I do not know how many times a day I violate or infringe somebody's copyright.*
>
> "Q. If you had no medium by which to secure—through which to secure blanket privilege of broadcasting musical compositions in large numbers, such as you get from the ASCAP, [abbreviation for appellant Society] would it be practically possible to operate your station, without infringing?
>
> "A. Well, I never know when I am infringing, and I don't know now. *We feel that the only protection we have is the license which we get from ASCAP.*"

At the close of this testimony, there was no cross-examination as appears from the following notation in the record:

> "Mr. Dill: No questions" (R. 234).

The third statement, to the effect that it is impossible to segregate the cost of compiling the music required by the

State Statute as betwen the copyrights owned by the members of the Society and the copyrights owned by the foreign societies is likewise contradicted by the allegations of the bill of complaint. As to the foreign societies, the cost of attempting to compile such a list (where nothing more than an *attempt* can be made because complete compilation is impossible) is alleged to be in excess of $50,000 (R. 20), whereas the cost for filing the list for the Society and affiliated societies is in excess of $300,000.

Although the Society represents 44,000 members of foreign societies, the number of American copyrights owned by members of such foreign societies is quite obviously substantially less than the number of copyrights owned by the 1123 members of the appellant Society. The copyrights owned by members of the Society are primarily American copyrights and the copyrights owned by the members of the foreign societies are primarily foreign copyrights. But members of the Society own *some* foreign copyrights and members of foreign societies own *some* American copyrights. It is for that reason that mutual working arrangements are necessary which permit each society to license in its respective territory the works copyrighted in that territory by members of foreign societies. Because of the far greater number of American copyrights owned by members of the American Society, an attempt to compile the list required by the statute will cost five times as much as to the members of the American Society as it will with respect to members of foreign societies, notwithstanding the additional difficulties entailed in obtaining information from members of foreign societies, all of whom reside abroad.

At page 15, appellees state:

> "There being no method of determining from the allegations of the bill of complaint in this action the value of the right of the Society and its own membership to license public performance of musical copyrights, or of ascertaining of any loss which the Society itself

would suffer in the event the statute would be complied with, the Society has not made the requisite showing of $3,000., exclusive of interest and costs herein."

This conclusion follows from the false premises advanced above. Since the premises are false, the conclusion falls. The complaint quite obviously shows that the Society will lose a sum in excess of $60,000.00 annually which it would receive from users in the State of Washington but for the enactment of the state statute. If the Society attempts to comply with the statute, it will lose at least the $300,000.00 which would be the cost of attempting to compile the information required by the statute. As a matter of fact, however, there would necessarily be a loss of the full $60,000.00 because the present contracts between the Society and users in Washington are outlawed, and secondly, the expenditure of an excess of $300,000.00 to attempt to compile the information required, would be a futile expenditure because the statute requires the furnishing of a "complete" list. It is impossible to furnish a complete list, and the furnishing of a partial list would not be a compliance with the state statute. Hence, an attempt to comply with the statute would merely result in a useless expenditure of more than $300,000.00 and in a loss of more than $60,000.00 which the Society now receives annually from users in Washington.

The third point of appellees' brief is that "the jurisdictional amount as to the individual appellants has not been shown". (p. 20.)

In attempting to support this conclusion, appellees argue that the complaint merely contains conclusions as to the values of the copyrights of the individual appellants ranging from $1,000,000.00 down to $100,000.00 and as to the cost of attempting compliance with the statute, ranging from $25,000.00 down to $10,000.00 as to each appellant and alleges that each appellant received from the Society in 1936 amounts varying as to each from more than $50,000.00

to more than $5,000.00 "for licensing the public performance of their works over the entire world". There is nothing in the bill of complaint from which a conclusion can be inferred that the sums received by each appellant from the Society are for the granting of licenses "over the entire world". *The only conclusion justified from a reading of the complaint is that the amounts received by the individual appellants from the Society are received from a licensing of copyrights in the United States.*

If the individual appellants were compelled to withdraw from the Society (as they must if they wish to comply with the statute and to avoid its penalties) they must forego the entire amount now received from the Society regardless of the source of the revenue. They cannot obtain any compensation separately from the licensing of their work abroad because foreign societies have already been granted the right to license such works. Since appellants will each lose these amounts because of the enactment of the State Statute, that loss will directly result therefrom.

Appellees attempt to escape this inevitable conclusion by stating at page 22 of their brief:

> "We are here dealing with a state statute operative only within the territorial limits of the state, which can damage each of the individual appellants only to the extent that it affects his business done within the state."

And further (pp. 22-3):

> "Nowhere is there an allegation * * * as a matter of fact, that a single piece of music belonging to the individual complainants was ever publicly performed in the State of Washington."

We have already shown that the last statement above quoted is incorrect and that the bill of complaint repeatedly alleges that the musical compositions belonging to appellants have been performed within the State of Washington and are being constantly performed there.

As to the first statement immediately above quoted, the statute itself bristles with contradictions of appellees' conclusion. From beginning to end, the statute operates extra-territorially.

Section 3 condemns combinations "either within or *without the State*"; requires licenses to be issued on a "per piece basis" at no higher rate in the State of Washington *than in other States*, and prevents copyright owners from further restraining the use of their works after selling a license for public performance for profit "either within or *without* the State".

The lists required by Section 4 must be supplied to the Secretary of the State of Washington (under Section 6) even though appellants do no business in the State of Washington so long as performances of their copyright compositions may be *heard* within the State of Washington "whether originating from a point within the State or from *without*".

Section 7 declares that the production and creation of copyrighted music is affected with the public interest of the State of Washington if performances of the work *originating without the State* may be heard within the State; and gives appellants' copyrights a fictitious situs within the State of Washington if performances originating without the State may be heard within the State.

Section 8 supplies a fictitious definition of doing business which would subject appellants to the jurisdiction of the Washington State Courts if any of their agents should merely use the highways of the State or should investigate infringements of their copyrighted compositions therein. The purpose of this fiction is to give the Courts of the State jurisdiction over the appellants, all of whom are non-residents, even though they do not do business within.

Section 9 permits the bringing of actions against such non-residents on substituted service made on the Secretary of the State. In any action brought under Section 9, the Court must appoint a receiver who must seize the copy-

righted works of all copyright owners in the "combination, including all of the rights to suits for infringements and damages in both State and Federal Courts, and all choses in action and all sums due on contracts and licenses." The failure to submit to the jurisdiction of the Court and to comply with the statute results in the forfeiture and seizure of all the appellants' copyrighted works to the State of Washington regardless of the actual situs of such works.

It is alleged, *without contradiction*, that the copyrighted works of all appellants have been used in the State of Washington (R. 23-4, 27-8); that appellants are all non-residents (R. 3); that the copyrighted works of each of the appellants have a value ranging from a million dollars down to one hundred thousand dollars (R. 8-12); that the right to perform the copyrighted musical works of all appellants is presently licensed to 528 users of music in the State of Washington (R. 18); and that under these contracts certain royalties must be paid to appellants. (Exhibits F, G and H; R. 69, 72, 73)

In the face of all these provisions of the statute and the allegations of the complaint, appellees assert, first, that the statute does not attempt to operate extraterritorially and, secondly, that the rights and property of appellants outside the State of Washington are not affected by the State statute. Why then does the statute contain provisions which make certain acts criminal which are performed wholly without the state, and why does the statute subject appellants to the jurisdiction of the state courts when they neither reside in the state nor do business therein, and why does the statute give appellants' copyrights an artificial situs within the State of Washington, and why does the statute provide that an officer of the Washington court shall execute an involuntary assignment which must be filed not within the State of Washington but in the office of the Register of Copyrights at Washington, D. C.?

The obvious fact is that the statute has no other purpose than to regulate business done wholly without that state.

The fictions through which the State of Washington attempts to bring these out-of-State acts as well as these non-residents and their property into the State can neither convert extra-territorial acts into intra-State transactions, nor give the copyrights of the non-resident appellants a *situs* within the State. See *Morrison* v. *California*, 291 U. S. 82, 90. Yet the State Statute *attempts* to do so, and will succeed in so doing unless the injunction prayed for by appellants be granted. Since the State Statute affects, and in fact attempts to confiscate appellants' property without the State, the value of that property furnishes the standard by which the jurisdictional amount is measured. See *Healy* v. *Ratta*, 292 U. S. 263, where this Court said (P. 9-D. C. reply brief).

After arguing that the Society has no standing in court because it has no property rights "for the purpose of protecting performing rights of its members' copyrights" (appellees' brief, p. 17) appellees make the following startling assertion at page 29:

> "the appellants have bargained away under these contracts all rights of every description pertaining to the licensing of the performing rights in their copyrights. The statute under attack affects only the licensing of performing rights. Plainly, the individual appellants have not and will not have until December 31, 1940, any interest in the matter in controversy sufficient to give them any standing as complainants in this action or to establish any jurisdictional amount on their behalf.
>
> "Appellants have vested exclusively and irrevocably the right to bring any action to protect such public performing rights, and have disabled themselves from being parties to these proceedings."

In one breath appellees contend that the Society has no standing in court because it has no interest in these performing rights and in the next breath they argue that appellants individually have no standing in court because they have assigned all their performing rights until Decem-

ber 31, 1940, to the Society. Certainly these rights are not suspended in mid-air. They are vested somewhere. The bill of complaint shows quite clearly that the rights of the respective appellants are of two classes. First, they sue jointly on behalf of all members of the Society for the injury to their joint rights as represented by their assignments to the Society for the period expiring December 31, 1940.

The value of the injury to this right which the statute causes is in excess of $60,000 a year. The value of the injury to the *individual* rights of the appellants by reason of the destruction of their copyrights resulting from the operation of this statute ranges from $1,000,000 down to $100,000 quite apart from the value of their joint rights as members of the Society. It is for that reason that appellants in their individual capacity have joined in this action with Gene Buck who is suing individually and on behalf of all the members of the American Society of Composers, Authors and Publishers.

In their conclusion appellees refer to the decision of the three judge court in Montana consisting of Circuit Judge Haney and District Judges Pray and Baldwin. A very substantial portion of the opinion of Circuit Judge Haney is quoted. No mention is made, however, of the dissenting opinion by District Judge Baldwin to which the attention of this Court is respectfully directed. This dissenting opinion was not called to the attention of counsel for appellants until after preparation of the brief in the companion case of *Gibbs* v. *Buck*, No. 276.

The burden of the majority opinion of Judge Haney in the Montana case lies in the statement that "there is no showing that the cost of compliance will not be returned in greater income." It will cost at least $300,000 to *attempt* to comply with this statute. Even if the expendiure of this $300,000 is made, the lists furnished will not be complete and therefore will not be in full compliance with the re-

quirements of the statute, since it is impossible to obtain all the information required by the State Statute (R. 171).

It is submitted that the arguments advanced in the majority opinion of Judge Haney in the Montana case are fully answered by the dissenting opinion of Judge Baldwin. Copies of both opinions will be handed up on the argument.

Appellees' brief seeks to answer point II of Appellants' brief (which is the same in an abbreviated form as "B" of point 1 of our brief in *Gibbs* v. *Buck*, the Florida case) by citing *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68. In that case the claim was that a state tax on the capital stock of a corporation was invalid because, aside from some tangible property, the stock represented the supposed value of letters patent. It was contended that the federal Circuit Court in which the suit was brought had jurisdiction because the action arose "under the patent * * * laws of the United States," and because what is now subdivision 14 of Section 24 of the Judicial Code applied. This Court held that the suit did not arise under the patent laws. It is true that this Court said that the statutes which preceded subdivision 14 of Section 24 "referred to civil rights only;" and it also said that state legislation denying equal protection of the laws was governed by what is now subdivision 1 of Section 24. However, as was pointed out in our brief in the Florida case, this Court later in *Truax* v. *Raich*, 239 U. S. 33, affirmed a decision of the District Court of Arizona (219 Fed. 273) which invalidated a statute of Arizona on the ground that it denied the equal protection of the laws. In the District Court it was specifically held (see paragraph 4 of the Syllabus and page 283) that an allegation "of the amount in controversy" was not necessary to give the court jurisdiction. This Court in its opinion made no reference to this point but we think that it must have considered that the District Court was correct, otherwise it would have dismissed the case for lack of jurisdiction. This was the construction placed upon the decision by Judge Learned Hand in *Marcus Brown* v. *Pollack*, 272 Fed. 135, 140. If

this interpretation of this Court's decision is correct, then it follows that if state legislation deprives one of the equal protection of the law, a federal court has jurisdiction over a suit to enjoin enforcement of such legislation irrespective of the amount in controversy. In addition, the appellants here and the appellees in the Florida case possess the right or privilege, secured to them by the Constitution of the United States, that their copyrights shall be unimpaired and unabridged by state legislation. In this aspect the case falls within the express language of subsection 14 of Section 24 of the Judicial Code (for copy of the Section, see page 36 of our brief in the Florida case).

Of course the imposition of a tax on the capital stock of a corporation, even though a part of the value of the latter is attributable to a patent, is a far different thing from the attempt by state legislation to deprive a copyright owner of some of the exclusive rights given to him by the Copyright Act. The Constitution protects him from impairment or abridgment of those rights. This Constitutional right or privilege was created by the Constitution in the sense that it did not exist prior thereto.

CONCLUSION.

THE DECREE APPEALED FROM SHOULD BE REVERSED WITH DIRECTIONS TO GRANT THE INTERLOCUTORY INJUNCTION PRAYED FOR.

Respectfully submitted,

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January, 1939.